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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER ADAM BROWN, Defendant and Appellant.	G041947 (Super. Ct. No. 06HF2309) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Craig E. Robison, Judge. Affirmed with directions.

Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Christopher Adam Brown of committing a lewd and lascivious act upon a child under the age of 14 years (Pen. Code, § 288, subd. (a)).[1] The jury also found it to be true: defendant engaged in substantial sexual conduct with the victim (§ 1203.066, subd. (a)(8)); and defendant committed the offense during the commission of a burglary with the intent to commit an offense specified in section 667.61, subdivision (c), a finding which results in a mandatory 25 years to life sentence (§ 667.61, subd. (a)). Accordingly, the court sentenced defendant to 25 years to life in prison.

Defendant, a resident of the home in which the crime occurred, claims he could not have committed burglary and the jury was improperly instructed with regard to the section 667.61 burglary issue. Defendant also argues his statements to the police should have been suppressed and the court erred in calculating presentence credits. We reject defendant's assertions and affirm the judgment, but instruct the trial court to determine whether defendant is entitled to presentence conduct credits.

FACTS

The victim's father testified to the following. In November 2006, he lived with his wife, two daughters (ages 21 and 12), and son (age 9) at an Irvine, California home.[2] Defendant, older sister's boyfriend, also lived in the home. Defendant occasionally contributed money or helped out in other unspecified ways, but father did not describe a formal financial arrangement between defendant and himself. Defendant also, on occasion, would babysit for victim and brother, and pick them up from school.

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[1] All statutory references are to the Penal Code.

[2] To avoid identifying the victim, we shall refer to the family members as father, mother, older sister, brother, and victim.

Mother testified the home in Irvine was owned by father. According to mother, defendant lived at the Irvine home for about nine months. Defendant lived in the garage, but spent time with older sister.

Older sister testified defendant lived at the Irvine home for almost one year; he first "rented out the garage"; then "he went into the living room"; and "then we moved into my room together." Older sister estimated defendant moved into her room approximately four or five months before the incident at issue.

Victim's bedroom is next to older sister's bedroom; the two rooms are adjacent to an exterior balcony and there are entrances to each room from the balcony.

At trial, the victim testified defendant: did *not* enter her room on the night of November 19-20, did *not* touch her vagina, and did *not* touch her buttocks. The victim testified her hallway door was closed as always on the night in question. The victim testified she told her father she "had a bad dream or something" after waking up and walking to father's room.

The prosecutor introduced evidence of the victim's prior inconsistent statements. A school counselor testified victim approached her on the afternoon of November 20, 2006. Victim appeared tense, and started to cry when she began talking. Victim said she awoke in the morning, felt someone was in her room, and thought she saw defendant hiding beside her bed. After victim turned on the light, she saw defendant. Victim told the counselor she recalled being touched on her "private parts." Mother also testified that victim, after meeting with the counselor, told mother defendant touched her while she was sleeping.

An Irvine police officer interviewed victim on November 22, 2006. A tape of this interview was played for the jury. At this interview, victim said she caught defendant in her room early in the morning of November 20, 2006. Victim saw defendant touching her, then defendant hid behind victim's tea set toy. Victim said

defendant touched her "front and back," which she explained to mean her vagina and buttocks.

Father testified victim entered his room at approximately 5:00 a.m. on the morning of November 20, 2006. Victim was crying and said someone was in her room. Victim mentioned defendant's name.

The parties stipulated to the following: "if recalled to testify, [a police officer] would state that during her interviews with the defendant, the defendant denied going into [victim's] room during the nights of November 19, 2006, and the morning of November 20, 2006. And when asked if he had ever touched her while she was wearing her red pajamas, he answered no." Older sister testified she went into victim's room at about 5:30 a.m. to look for a shirt. Older sister, a self-professed "really light sleeper," also testified she did not notice defendant leave older sister's room that night.

The parties also stipulated "that the defendant did molest his two younger sisters prior to December 29th of 1999." The two girls were ages nine and 10 at the time.

DISCUSSION

Sufficiency of Evidence Supporting Burglary Finding

Defendant claims he could not have committed burglary under section 667.61, subdivision (d)(4), because he resided at the home where the criminal conduct occurred. "Every person who enters any house, room, [or] apartment . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." (§ 459.) Statutory burglary in California expands upon the common law definition, which limited the crime to the "breaking and entering of a dwelling in the nighttime." (*People v. Davis* (1998) 18 Cal.4th 712, 720.) Now, "[t]here is no requirement of a breaking; an entry alone is sufficient. The crime is not limited to dwellings, but includes entry into a wide variety of structures. The crime need not be committed at night." (*Id.* at pp. 720-721.)

"Can a person burglarize his own home?" (*People v. Gauze* (1975) 15 Cal.3d 709, 711 (*Gauze*).) Not if that person has "the right to enter the premises at all times" and is charged with walking into the living room of his apartment and shooting his roommate. (*Id*. at pp. 711, 717, 719 [reversing burglary conviction against cotenant of apartment but affirming assault with a deadly weapon conviction].) Defendant cites *Gauze* as support for his argument he could not have committed a burglary because he lived at the home of the victim. Defendant also cites dicta from a case concerning multiple burglaries of separate classrooms in a school building. (*People v. Elsey* (2000) 81 Cal.App.4th 948, 960-961 ["family members living in the same house together are not likely to have a separate or different expectation of protection against unauthorized entry as to each interior room once the house itself has been violated: Family members are unlikely to lock interior doors against each other; they share common access to all rooms within the house; and the size of an average single-family house does not ordinarily support an expectation of protection against intrusion in one part of the house if a burglar has already invaded another"].)

The facts in this case differ from *Gauze* in the following pertinent respects: (1) defendant was the live-in boyfriend of one of the homeowner's daughters, not an owner or formal tenant of the premises; and (2) defendant committed his crime in the middle of the night after entering the bedroom of the victim (not by walking into a common room of the residence such as the living room).

Cases following *Gauze* show its reach is limited. In *People v. Pendleton* (1979) 25 Cal.3d 371, our Supreme Court explained that *Gauze* "did not overrule existing authority upholding burglary convictions in which there was consensual entry. The law after *Gauze* is that one may be convicted of burglary even if he enters with consent, provided he does not have an unconditional possessory right to enter." (*Pendleton,* at p. 382; see also *In re Andrew I.* (1991) 230 Cal.App.3d 572, 579 ["Permission to enter, whether express or implied does not confer upon the entrant an unconditional possessory

interest in the premises"].) Thus, a defendant may be convicted of burglary even though defendant enters the victims' residence at the express invitation of one of the victims who owned the cabin in which the crimes occurred. (*People v. Frye* (1998) 18 Cal.4th 894, 953-955 (*Frye*), disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "Any person who enters a house or building with the intent to commit a felony or theft is guilty of burglary. [Citation.] The entry need not be a trespass to support a burglary conviction. [Citations.] Thus, a person who enters for a felonious purpose may be found guilty of burglary even if he enters with the owner's or occupant's consent." (*Frye*, *supra*, 18 Cal.4th at p. 954.)

In *People v. Sparks* (2002) 28 Cal.4th 71, a case in which a magazine salesman defendant was invited into a rape victim's home, our Supreme Court held a "defendant's entry into a bedroom within a single-family house with the requisite intent can support a burglary conviction [even though] that intent was formed only after the defendant's entry into the house." (*Id*. at p. 73-74.) The defendant, who had been sitting at the dining room table, followed the victim into her bedroom and raped her after she had asked him to leave and walked into her bedroom to retrieve her shoes. (*Id*. at p. 74.)

In *People v. Abilez* (2007) 41 Cal.4th 472, our Supreme Court went even further: "that [defendant] may have had a possessory right to enter the home does not preclude a conviction for burglary on these facts." (*Id*. at p. 509.) Abilez murdered his mother in her bedroom. (*Id*. at p. 481-482.) Abilez, like his mother's other adult children, often stayed at his mother's home and used her spare bedroom. (*Id*. at p. 482.) The court explained that even if Abilez was permitted to reside in his mother's home at the time of the murder, "[t]he jury could have concluded that, under the circumstances, defendant at [the] time lacked the victim's consent to enter [his mother's] bedroom . . . ." (*Id*. at p. 509.) Moreover, as to a second count of burglary pertaining to theft from a different bedroom, the court observed: "As defendant broke into [his sister's] locked

bedroom and stole her electronic equipment, that he may have lived in the house is immaterial." (*Ibid.*)[3]

Given the aforementioned cases, the appropriate question to ask in this case is not whether a person can burglarize his own place of residence. It is more productive to ask whether defendant, a live-in boyfriend of a homeowner's daughter, has an "unconditional possessory right to enter" the premises? And, even if defendant's status entitled him to an unconditional possessory right to enter the *home*, did defendant have an unconditional possessory right to enter the bedroom of the homeowner's child? (§ 459 ["Every person who enters any . . . room . . . with intent to commit . . . any felony is guilty of burglary"].)

We conclude the evidence supports a conclusion that defendant did not have the unconditional possessory right to enter the premises or, at a minimum, victim's room on the night of the crime. Defendant's right with regard to the property was, at most, that of a licensee, "revocable at any time at the will of the [home's owner]." (10 Summary of Cal. Law (10th ed. 2005) Real Property, § 430, p. 501.) Thus, his right to enter the premises was conditional at the will of the owners. The two key factors in this case — (1) defendant's status as merely a live-in boyfriend, and (2) the commission of the crime in the victim's bedroom — are sufficient to support the judgment.

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[3] Also of note is *People v. Richardson* (2004) 117 Cal.App.4th 570 (*Richardson*). In *Richardson*, the defendant was invited to stay in an apartment for "a couple of weeks" by defendant's sister and his sister's roommate. (*Id.* at p. 572.) Defendant was convicted of two counts of burglary for taking items from each of the tenants' bedrooms. (*Ibid.*) The appellate court found the trial court erred by allowing two separate burglary convictions, one for each entry into the tenants' bedrooms. (*Id.* at pp. 573-577.) But the underlying premise that the *Richardson* defendant could be convicted for burglary even though he was living in the apartment was not challenged or examined.

Alleged Instructional Error

Defendant also asserts the court had the sua sponte duty to instruct the jury that it could not find defendant guilty of burglary if it found defendant had an unconditional possessory interest in the residence. "[S]ince burglary is a breach of the occupant's possessory rights, a person who enters a structure enumerated in section 459 with the intent to commit a felony is guilty of burglary *except* when he or she (1) has an unconditional possessory right to enter as the occupant of that structure or (2) is invited in by the occupant who knows of and endorses the felonious intent." (*People v. Salemme* (1992) 2 Cal.App.4th 775, 781.)

Defendant concedes the court properly instructed the jury with the elements of the offense in CALCRIM No. 3178: "If you find the defendant guilty of the charge in Count 1, you must then decide whether the People have proved the additional allegation that the defendant committed the crime during the commission of a burglary, with the intent to commit 288(a) of the Penal Code — Lewd Act Upon a Child Under Age 14. [¶] To prove this allegation, the People must prove that: [¶] 1. The defendant entered an inhabited house or room in an inhabited house; [¶] 2. When the defendant entered the house or room in an inhabited house, he intended to commit 288(a) of the Penal Code-Lewd Act Upon a Child Under Age 14; [¶] AND [¶] 3. After the defendant entered the house or room in an inhabited house, he committed 288(a) of the Penal Code-Lewd Act Upon a Child Under Age 14 before he escaped to a place of temporary safety. [¶] . . . [¶] The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

But, according to defendant, the court should have instructed the jury that an unconditional possessory interest in the residence is a defense to burglary. (See *People v. Felix* (1994) 23 Cal.App.4th 1385, 1397 [consent to entry and taking of property is a defense to burglary, not element of offense].) Defendant raised this defense in a motion to reduce bail; at the conclusion of the preliminary hearing; on a motion to

dismiss the information pursuant to section 995; and (arguably) on a motion to dismiss under section 1118.1. The argument failed each time it was raised. Defendant did not request a jury instruction on this defense. Nor did defendant argue to the jury he had an unconditional possessory interest in the home and/or the victim's bedroom; the defense presented at trial was defendant was not in victim's room and victim did not accurately describe what occurred in her out-of-court statements in the days following the incident.

"In the absence of a request for a particular instruction, a trial court's obligation to instruct on a particular defense arises '"only if [1] it appears that the defendant is relying on such a defense, or [2] if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."'" (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1148.)

Defendant did not rely on the defense. Moreover, there is not substantial evidence supporting this defense. The jury could reasonably have found defendant had a possessory interest in his bedroom and certain common areas in the home, but it was not unconditional. Moreover, there is no evidence in the record suggesting defendant had an unconditional possessory interest in victim's bedroom. Without the introduction of such evidence, the court had no sua sponte duty to instruct on this defense.

Defendant claims in the alternative that he received ineffective assistance of counsel because his attorney failed to request a suitable instruction. "'To establish ineffective assistance, defendant bears the burden of showing, first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him.'" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052-1053.) Because there was not substantial evidence to support a defense based on an unconditional possessory right to enter the victim's room, defendant cannot make this showing on direct appeal. (*People v.*

Burney (2009) 47 Cal.4th 203, 246; *People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1046.)

Admissibility of Defendant's Statements to Police

Defendant also asserts the court erred when it denied his motion to exclude admissions defendant made to police about his prior sex crimes and continuing "urges" he experienced on a periodic basis. In response to police questioning prior to his arrest, defendant told officers he had engaged in sexual misconduct with his younger sisters (namely, "dry intercourse" and sodomy), he had been arrested and punished for these acts while a juvenile, and he still had "urges" which he did not act on. These admissions occurred prior to defendant being advised of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Defendant, subsequently arrested and given *Miranda* warnings, continued to make incriminating statements at the police station.

Miranda warnings must be provided once a suspect is taken into custody. (*People v. Huggins* (2006) 38 Cal.4th 175, 198.) The standard for determining whether a suspect has been taken into custody is objective: "Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest?" (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403.) Pertinent factors include "(1) whether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning." (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.) A court may also consider whether the suspect voluntarily agreed to be interviewed. (*Pilster*, at pp. 1403-1404.)

"The question whether defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] 'Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not

at liberty to terminate the interrogation and leave.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.) The first inquiry is factual and subject to the deferential substantial evidence standard; the second inquiry is legal and subject to de novo review. (*Ibid.*)

In hearing testimony on defendant's motion to exclude his admissions from testimony, the court explicitly found the testimony of defendant and older sister (defendant's girlfriend) to be not credible. The court credited a police officer's account as credible. According to the officer: On November 20, 2006, after interviewing victim at the police station, two officers went to the Irvine home of victim; victim's mother let the officers into the home; the officers approached defendant in front of the home after he arrived with older sister; the officers did not draw weapons or handcuff defendant; the officers asked defendant his name and asked if they could pat him down for weapons; defendant consented to a pat down; the officers asked defendant if they could "talk to him in private" because the "subject matter" was delicate and potential witnesses were present; the officers and defendant walked through the home into the garage; defendant sat down on a chair; the officers did not block the door or tell defendant he could not leave; one of the officers began asking questions about the alleged molestation of victim; and the same officer also asked about whether defendant had ever been arrested before (to which defendant said yes and provided details about his prior sexual misconduct). Defendant was arrested following the questioning, which lasted 20 to 30 minutes. During the questioning, the officers stayed at least 10 feet away from defendant. The questions were delivered in "[a] regular conversation tone" and neither officer was "aggressive, confrontational, or accusatory."

In denying the motion, the court commented: "A quiet location in the defendant's own home, not a jail cell, not the back seat of a police car or a police interview room is a much less threatening environment. And that's a big factor in the court's consideration. [¶] It makes sense to have a place away from what [the officer]

believed may ultimately be witnesses at his trial; a good practice. Restraint of his freedom of movement was not that normally associated with formal arrest, and I find he was not in custody for purposes of *Miranda*." (Italics added.)

There is substantial evidence supporting the court's factual findings and, given such findings, the court correctly applied the law. Defendant was not in custody when he made his admissions concerning past sexual misconduct and ongoing "urges." Therefore, the court did not err when it refused to exclude evidence of defendant's admissions.

Sentencing Issues

Finally, defendant contests the court's calculation of credits at the sentencing hearing. "A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered." (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.)

At sentencing, the court awarded 878 days of actual custody credits pursuant to section 2900.5. As an initial matter, the parties agree defendant was shortchanged by two days in this regard; defendant should have been awarded 880 days of actual custody credits.

The other sentencing contention is disputed. The court commented at sentencing: "You do not accrue good time work time credits until you have served the minimum term." It appears defense counsel attempted to present the court with the total number of presentence credits (actual plus credits for work/good behavior), but the court awarded only actual credits.

It is uncontested defendant was actually eligible to accrue work and good behavior credits under section 4019, as limited by section 2933.1. "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in

Section 2933." (§ 2933.1, subd. (a).) "Notwithstanding Section 4019 or any other provision of law, the maximum credit that may be earned against a period of confinement . . . following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a)." (§ 2933.1, subd. (c).) Defendant was convicted of violating section 288, subdivision (a), which is a felony offense listed in section 667.5, subdivision (c). (§ 667.5, subd. (c)(6).) Thus, defendant was *eligible* for work and good behavior credits amounting to a maximum of 15 percent of the time he was confined prior to sentencing.

The court awarded no credits for work or good behavior. As defendant suggests, it appears the court simply did not think defendant was eligible for such credits or did not consider the issue. The People, relying on a citation to the probation report, argue defendant did not receive conduct credits because he did not deserve such credits based on his behavior while in jail. We see nothing in the record to suggest the court made any factual findings on this issue. We therefore direct the trial court to make a determination whether defendant was entitled to such presentence conduct credits and, if so, to calculate the appropriate credits.

DISPOSITION

The trial court is directed to make a determination of whether defendant is entitled to any presentence conduct credits and, if so, to calculate those credits in a manner consistent with this opinion. The trial court should also award defendant two additional days of presentence actual credit, bringing the total to 880 days (rather than 878 days). The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.